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LIM E TERN & ORS v. PENGARAH HOSPITAL TUANKU JA'AFAR, SEREMBAN & ORS

HIGH COURT MALAYA, SEREMBAN
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: NA21NCVC-11-10-2020]
B 30 JUNE 2022

Abstract – *(i) The court, in dealing with an application to set aside an order for costs against the defendant for failing to comply with pre-trial directions, could not discharge the order of costs in its entirety, on account of the defendant's conduct which bordered on the contumelious. However, taking into consideration the expression 'any proceedings under this Act' under s. 31(6) of the Government Proceedings Act 1956 ('GPA'), which is not meant to refer to proceedings that are instituted pursuant to the provisions of the GPA, but rather to civil proceedings to which the Government is a party, the court discharged the portion of the order that required the costs to be borne by counsel for the defendants personally; (ii) When the privileging and credentialing of documents sought in a discovery application are found to be relevant, the court ought to direct for it to be provided. It is the role of the court not only to deliver justice in disputes between parties, but also to do so in an expeditious and economical way.*

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F ***CIVIL PROCEDURE:*** *Costs – Order for costs – Order for costs for failure to comply with pre-trial directions – Setting aside – Application for – Whether order for costs ought to be discharged in its entirety – Government Proceedings Act 1956, s. 31(1), (6)*

CIVIL PROCEDURE: *Discovery – Application for – Seeking privileging and credentialing documents – Relevancy – Unless order – Whether appropriate in circumstances*

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These grounds of judgment relate to (i) an order of costs in the amount of RM500 given by the court against the defendants for failure to comply with pre-trial directions; and (ii) an unless order made by the court for the discovery of certain documents in the possession of the defendants. The first
H plaintiff, a minor, suffered from cerebral palsy. Through his mother and litigation representative, he sued certain members of staff of Hospital Tuanku Ja'afar for medical negligence related to the circumstances of his birth. The second and third plaintiffs were the first plaintiff's father and mother respectively. It was the plaintiff's case that the negligence on the part of the
I defendants had led to cerebral hypoxia and ultimately to the condition from which the first plaintiff suffered. In the course of case management conferences, the court was informed that the plaintiffs wished to adduce

expert testimony, and for this purpose expert reports would be prepared. The court directed that the expert reports comply with the requirements of O. 40A of the Rules of Court 2012 ('ROC'). At a case management conference held on 12 July 2021, the court was informed that three of the plaintiffs' expert reports were ready and were subsequently emailed to the defendants' counsel. At the 23 September 2021 case management conference, the court was informed that the defendants' expert reports had yet to be filed, contrary to directions given on the last date. The court gave an unless order for such reports to be filed within a period of a further eight weeks. Despite the unless order, the defendant's expert reports were only provided on 24 January 2022, approximately two months after the extended deadline set by the court, and four months after the original deadline. In a case management conference on 8 March 2022, the plaintiff was directed to prepare a table of experts' issues. The direction by the court to prepare the table of experts' issues was intended to facilitate a discussion between the experts prior to trial and was given pursuant to O. 40A r. 5(3) of the ROC. At the case management conference on 29 March 2022, the court reviewed the draft table of experts' issues and suggested amendments to its format. At the case management conference on 27 April 2022, the court was informed that, instead of commenting on, and amending the plaintiff's draft experts' table, the defendants had prepared a separate table setting out the defendants' expert issues. As a consequence of the failure by the defendants to comply with the directions of the court, the court directed that they bear costs of RM500 as costs thrown away. Dissatisfied with the order of costs, the defendant applied for the order to be set aside. In the meantime, the plaintiffs had made an application for discovery in encl. 43. The plaintiffs requested the privileges and credentialing documents from the defendants. Subsequently, the plaintiffs filed another discovery application, in encl. 61, to obtain the privileges and credentialing documents for the doctors involved. The defendants argued that the privileges and credentialing documents for the other doctors (other than the fifth and ninth defendants) were not relevant and hence, need not be disclosed to the plaintiffs.

Held (allowing setting aside application in part; unless order made by court for discovery of certain documents):

(1) In regard to the setting aside application, the attention of the court was drawn to s. 31(6) of the Government Proceedings Act 1956 ('GPA'). What was meant by 'any proceedings under this Act'? Would a suit in negligence to which the Government was a party – such as the present case – be considered to be proceedings under the GPA. Surely, if Parliament had meant s. 31(6) to refer to any civil proceedings to which the Government was a party, then Parliament would have said so. Indeed, in s. 31(1), a similar formulation was used. However, having considered GPA as a whole, this was the correct construction of s. 31(6). The expression 'any proceedings under this Act' was not meant to refer

to proceedings that were instituted pursuant to the provisions of the GPA, but rather to civil proceedings to which the Government was a party. For this reason, the court discharged that portion of the order that required the costs to be borne by counsel for the defendants personally. (paras 26-30)

(2) This court was, however, not minded to discharge the order of costs in its entirety, on account of not just the delay on the part of the defendants to comply with the directions of the court that bordered on the contumelious, but also on account of the abject failure on the part of counsel for the defendants to appreciate that, having two comparison tables defeated the very purpose of a comparison table. Thus, the setting aside application was allowed in part only, in respect for the order for the costs to be borne by counsel for the defendants personally. (paras 30 & 31)

(3) In order to succeed in their discovery application, the plaintiffs must establish three essential elements identified in the case of *Yekambaran Marimuthu v Malayawata Steel Bhd*. In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true. The plaintiffs had named all the defendants because they had been involved, in some respect or another, in attending to the third plaintiff when she had gone to the hospital to deliver her baby. This was ascertained by the medical records available to the plaintiffs prior to the filing of the action. The privileging and credentialing documents sought in respect of all the defendant doctors were relevant, using the test in *Yekambaran*'s case. It stands to reason that the credentials of the doctors attending the first and third plaintiffs were relevant, as this went directly to the issue of whether they were appropriately qualified. Whether or not all the doctors had been actually involved in attending to the third plaintiff and the first plaintiff (after his birth) was a matter for determination at trial. (paras 38, 40 & 41)

(4) The court directed that the privileging and credentialing documents be provided no later than the end of the week in question, failing which judgment would be entered against the defendants. An unless order was appropriate in the circumstances, given the imminence of the trial dates, and also taking into account the conduct of the case by counsel for the defendants up to that point. Had trial not proceeded on the scheduled dates, the court's next available dates would be more than a year hence, which would have been an unacceptable delay. It is the role of the court not only to deliver justice in disputes between parties, but also to do so in an expeditious and economical way. (para 42)

Case(s) referred to:
Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International) [1981] 1 LNS 204 ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(foll)***

Legislation referred to:
Government Proceedings Act 1956, s. 31(6)
Rules of Court 2012, O. 40A r. 5(3)

For the plaintiffs - Harmindar Singh Dhillon & Sharannya Sundaramoorthy; M/s HS Dhillon & Co
For the defendants - Nurhafizza Azizan & Uma Devi Balasubramaniam; SFCs

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] These grounds of judgment relate to:

(i) an order of costs in the amount of RM500 given by the court against the defendants for failure to comply with pre-trial directions; and

(ii) an unless order made by the court for the discovery of certain documents in the possession of the defendants.

Background Facts

[2] The first plaintiff is a minor. He suffers from cerebral palsy. Through his mother and litigation representative, he sued certain members of staff of Hospital Tuanku Ja'afar in Seremban for medical negligence related to the circumstances of his birth. The second and third plaintiffs are the first plaintiff's father and mother respectively. It was the plaintiffs' case that the negligence on the part of the defendants had led to cerebral hypoxia and ultimately to the condition from which the first plaintiff suffers.

[3] The suit was filed in October 2020.

[4] At a case management conference on 5 July 2021, trial was fixed for eight days in June 2022.

The Order Of Costs

[5] In the course of case management conferences, the court was informed that the plaintiffs wished to adduce expert testimony, and for this purpose expert reports would be prepared. The court directed that the expert reports comply with the requirements of O. 40A of the Rules of Court 2012.

[6] At a case management conference held 12 July 2021, the court was informed that three of the plaintiffs' expert reports were ready. The court directed that the three reports be emailed to the defendants' counsel no later than the following Wednesday. Counsel for the defendants informed the court and the plaintiffs' solicitors of the identity of the defendants' experts. The court was further informed that defendants' expert reports would be ready within two months. The court directed that these reports be filed no later than the next case management conference date, which was fixed for 23 September 2021. The lawyers were informed by the court that further directions will be given regarding rebuttal reports to be prepared by the experts.

[7] The lawyers were also informed of the possibility that expert testimony would be received simultaneously at trial, in a process commonly known as hot-tubbing. The expert witnesses would testify after the witnesses of fact have testified.

[8] At the 23 September 2021 case management conference, the court was informed that the defendants' expert reports had yet to be filed, contrary to directions given on the last date. The court gave an unless order for such reports to be filed within a period of a further eight weeks. Despite the unless order, the defendants' expert reports were only provided on 24 January 2022, approximately two months after the extended deadline set by the court, and four months after the original deadline.

[9] Before any deadlines are fixed for any matter in the course of case management conferences, it is customary that I ask the relevant party how long they require to attend to the matter. So, it was in this case. The timelines were not plucked from thin air but determined after taking into account input from solicitors.

[10] In a case management conference on 8 March 2022, counsel for the plaintiff was directed to prepare a table of experts' issues, which was to be discussed the next case management conference three weeks later, on 29 March 2022.

[11] I pause the narrative here to observe that, by the end of March 2022, there would be little more than two months to trial. Even though there was ample time given for the preparation of the expert reports, it was only after an unless order was given that the defendants were able to deliver their expert reports.

[12] The table of experts' issues is a document that is intended to summarise the issues upon which the experts have opined. These issues are set out in tabular form, which enables a reader to quickly ascertain the areas in which the experts are in disagreement. The direction by the court to

prepare the table of experts' issues was intended to facilitate a discussion between the experts prior to trial, and was given pursuant to O. 40A r. 5(3) of the Rules of Court 2012, which provides as follows:

> (3) The Court may direct that following a discussion between the experts, they shall prepare a statement for the Court showing:
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> (a) the issues on which they agree; and
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> (b) the issues on which they disagree and a summary of their reasons for disagreeing.

[13] Customarily, the court would use the table of experts' issues as a rubric when taking the expert witnesses through their testimonies at the hot-tubbing proceedings. A discussion with the experts is held on an issue-by-issue basis. At the end of the discussion for each issue, counsel for the parties would be given an opportunity to pose further questions to the experts in cross-examination.

[14] At the case management conference on 29 March 2022, the court reviewed the draft table of experts' issues and suggested amendments to its format. The court directed that the parties settle the table within three weeks. The court fixed a further case management for 27 April 2022.

[15] By this time, there would have been just enough time for the discussion between the experts, as the first day of trial was on 7 June 2022, leaving slightly more than one month to schedule and complete a discussion between the experts, bearing in mind that the experts were medical practitioners whose schedules could reasonably be expected to be very busy.

[16] At the case management conference on 27 April 2022, the court was informed that, instead of commenting on, and amending, the plaintiff's draft experts' table, counsel for the defendants had prepared a separate table setting out the defendants' experts' issues.

[17] The course of action taken by counsel for the defendants was otiose, and quite contrary to logic. The function of the table of experts' issues was so that the views of the experts could be easily compared, and so that the proceedings could be directed to those areas where the experts are in disagreement. It ought to have been plain to counsel for the defendants that having two tables would have undermined the whole *raison d'etre* for the comparison table in the first place. It would be impossible for the opinions of the experts to be compared in summary form, unless they were set out in the same table.

[18] At the case management conference, counsel for the defendants was unable to provide reasons why the draft experts' table prepared by the solicitors for the plaintiffs was unacceptable to the defendants and why they had produced their own table instead of commenting and suggesting amendments to the plaintiffs' draft table. The previous directions were clear, that there could only be one table of experts' issues.

[19] As a consequence of the failure by counsel for the defendants to comply with the directions of court, I directed that they bear costs of RM500 as costs thrown away. One of the reasons for the case management conference was for the comparison table to be finalised to the extent possible between counsel, before scheduling a meeting between the experts. Because the defendants' counsel had not complied with the direction of the court, this objective could not be achieved. More than just that, I considered that, given that trial was imminent, it may not have been possible to schedule a meeting of the experts before trial. In effect, the substantial portion of the work done by the solicitors of the plaintiffs had been in vain.

[20] As events transpired, trial had proceeded and the evidence of the gynaecology and obstetrics experts was received without the use of the experts' summary table. No pre-trial discussion between the experts was held, which in my view, could have narrowed down the issues at trial.

[21] Dissatisfied with the order of costs, the defendants applied to me for the order to be set aside.

[22] At the final case management conference prior to trial held on 13 May 2022, the court was informed by Mr Harmindar, counsel for the plaintiffs, that the plaintiffs had no intention of enforcing the order of costs. Despite this, counsel for the defendants were adamant that the setting aside application be heard and disposed on its merits.

[23] Even before the setting aside application was heard, the defendants appealed against the order of costs.

The Setting Aside Application

[24] I heard the setting aside application on the first day of trial.

[25] I allowed the application in part only, in respect of the order for the costs to be borne by the counsel for the defendants personally.

[26] The attention of the court was drawn to s. 31(6) of the Government Proceedings Act 1956, which reads as follows:

> (6) A legal officer shall not be personally liable for costs in any proceedings under this Act.

[27] The expression "legal officer" includes an officer from the Federal Attorney General's Chambers.

[28] I observe that s. 31(6) is somewhat unhappily worded. What is meant by "any proceedings under this Act"? Would a suit in negligence to which the Government is party – such as the present case – be considered to be proceedings under the Government Proceedings Act 1956? Surely, if Parliament had meant s. 31(6) to refer to any civil proceedings to which the Government was a party, then Parliament would have said so. Indeed, in s. 31(1), a similar formulation was used.

[29] However, having considered the Government Proceedings Act 1956 as a whole, I was of the view that this was the correct construction of s. 31(6). The expression "any proceedings under this Act" was not meant to refer to proceedings that were instituted pursuant to the provisions of the Government Proceedings Act 1956, but rather to civil proceedings to which the Government was a party.

[30] For this reason, I discharged that portion of the order that required the costs to be borne by counsel for the defendants personally.

[31] I was, however, not minded to discharge the order of costs in its entirety, on account of not just the delay on the part of the defendants to comply with the directions of court that bordered on the contumelious, but also on account the abject failure on the part of counsel for the defendants to appreciate that, having two comparison tables defeated the very purpose of a comparison table.

The Discovery Application

[32] The defendants' expert report referred to privileges and credentialing documents for the doctors involved in the suit. This document is maintained by the hospital and sets out the medical procedures that may be undertaken by a particular doctor. A doctor's privileges and credentials to undertake particular medical procedures are determined by reference to the experience that the doctor has garnered in assisting in undertaking surgical procedures and in undertaking such procedures under supervision. The defendant's expert report was provided to the plaintiffs' solicitors on 24 January 2022.

[33] In the meantime, the plaintiffs had made an application for discovery in encl. 43, which was filed on 10 December 2021. At a case management conference before the Registrar of the court held on 7 February 2022, the court was informed that the solicitors for the plaintiffs had requested the privileges and credentialing documents from counsel for the defendants. Their somewhat startling response was that the defendants were willing to adduce the document at trial, but not beforehand for inclusion into the trial bundles. Counsel for the defendants made the point that the discovery application in encl. 43 had made no specific mention of the privileges and credentialing documents. This was understandably so, because encl. 43 had been filed before the defendants' expert reports had been made available. It may be observed that, had the defendants complied with the earlier court direction for their expert reports to be provided by the end of November, then the discovery application could have taken into account the contents of the reports, and the privileges and credentialing documents could have been requested in encl. 43. In effect, counsel for the defendants were relying on their own indolence to resist the pre-trial disclosure of the privileges and credentialing documents.

[34] The approach taken by counsel for the defendants forced the plaintiffs' hand. On 9 March 2022, the plaintiffs filed another discovery application, in encl. 61, to obtain the privileges and credentialing documents for the doctors involved. The court granted an extension of time until 25 March 2022 for defendants to file their affidavit in opposition. This deadline too came and passed. The affidavit in question was only filed on 1 April 2022.

[35] This affidavit acknowledged that there were two doctors who were involved in the lower segment caesarean section procedure undertaken on the third plaintiff. These were the fifth and ninth defendants.

[36] The discovery application was heard and disposed of on 27 April 2022. Counsel for the defendants argued the privileges and credentialing documents for the other doctors (other than the fifth and ninth defendants) were not relevant and hence need not be disclosed to the plaintiffs.

[37] In my judgment, this was contrary to the principles of discovery, where a plaintiff's case must be assumed to be true for the purposes of determining the relevance of a document sought to be discovered.

[38] In order to succeed in their application, the plaintiffs must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the judgment of the High Court) in *Yekambaran Marimuthu v. Malayawata Steel Bhd*[1]:

> The essential elements for an order for discovery are threefold; namely, first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

[39] Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International)*[2]:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may – not which must – either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v. Davies* [1938] 1 KB 196 at p 210.

[40] In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in an issue, the plaintiffs' case must be assumed to be true: see *Yekambaran*'s case, *op. cit.*, where His Lordship cited with approval the following passage from *The Principles and Practice of Discovery* by Edward Bray:

> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

[41] The plaintiffs had named all the defendants because they had been involved, in some respect or another, in attending to the third plaintiff when she had gone to hospital to deliver her baby. This was ascertained by the medical records available to the plaintiffs prior to the filing of the action. I was thus of the view that the privileging and credentialing documents sought in respect of all the defendant doctors were relevant, using the test in *Yekambaran*'s case. It stands to reason that the credentials of the doctors attending the first and third plaintiffs were relevant, as this went directly to the issue of whether they were appropriately qualified. Whether or not all the doctors had been actually involved in attending to the third plaintiff and the first plaintiff (after his birth) was a matter for determination at trial.

[42] The court directed that the privileging and credentialing documents be provided no later than the end of the week in question, failing which judgment would be entered against the defendants. I was of the view that an unless order was appropriate in the circumstances, given the imminence of the trial dates, and also taking into account the conduct of the case by counsel for the defendants up to that point. Had trial not proceeded on the scheduled dates, the court's next available dates would be more than a year hence, which would have been an unacceptable delay. I was mindful that it is the role of the court not only to deliver justice in disputes between parties, but also to do so in an expeditious and economical way.

Post Script

[43] When I received the notice of appeal in this case, it was not immediately obvious to me from the notice of appeal what order or direction of court had been made the subject matter of the defendants' appeal. It was only when clarification was sought from counsel that the court was told. Only then was it possible for these grounds to be prepared.

[44] By the time of writing, trial had completed, and the privileges and credentialing documents had been duly provided for the purposes of trial. I am of the view that, had there not been sufficient encouragement from the court to counsel and parties, there would have been a significant delay in this case.

[45] It may also be observed that both the issues canvassed in the appeal are somewhat academic, given that Mr Harmindar for the plaintiffs have indicated that he does not wish to pursue enforcement of the order of costs, and that the privileges and credentialing documents have been provided in compliance with the order of court. Counsel for the defendants have nonetheless found it fit to continue their pursuit of the appeal. While I am of the view that this is entirely their prerogative, the question may be validly asked whether this was a justifiable expenditure of public resources. It is certainly a questionable use of judicial time.

Endnotes:

1. *Yekambaran Marimuthu v. Melayawata Steel Bhd* [1994] 2 CLJ 581
2. *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International)* [1981] 1 LNS 204